SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1958

No. 870

ALBERT H. GRISHAM, PETITIONER,

vs.

CHARLES R. HAGEN, Warden

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

INDEX

A IN THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

(File endorsement omitted)

No. 12,630

ALBERT H. GRISHAM, Petitioner,
Appellant

v.

JOHN C. TAYLOR, Warden, U. S. Penitentiary, Lewisburg, Pennsylvania, Respondent,
Appellee

Appeal from Judgment and Order of United States District Court for the Middle District of Pennsylvania denying petition for writ of habeas corpus and dismissing rule to show cause

Appendix to Appellant's Brief—Filed August 11, 1958

1a IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

(Title omitted)

No. 330 Habeas Corpus Docket

Docket Entries

Oct. 26, 1957, Petition for writ of habeas corpus. Copies to U. S. Attorney.
Nov. 5, 1957, Rule to Show Cause. Copy to U. S. Attorney and counsel for Petitioner.
Nov. 25, 1957, Return and Answer.
Jan. 2, 1958, Order setting hearing at Lewisburg for Jan. 27, 1958.
Jan. 27, 1958, Respondent's Exhibit G.
Jan. 27, 1958, Petitioner's Exhibit 1. (Copy of Court Martial Trial.)
2a Jan. 27, 1958, Clerk's Minute of hearing.
April 22, 1958, Opinion and Order. Petition denied rule discharged. Copies mailed counsel.
April 23, 1958, Notice of Appeal. Copies to Govt. Counsel and Clerk C. C. A.

May 29, 1958, Order extending time for docketing record on appeal ninety days from April 22, 1958. Copy to counsel and U. S. Court of Appeals.
June 5, 1958, Transcript of hearing of Jan. 27, 1958.

3a IN UNITED STATES DISTRICT COURT

Petition for Writ of Habeas Corpus—October 26, 1957

To the Honorable, the Judges of Said Court:

Your Petitioner, ALBERT H. GRISHAM, respectfully represents:

1. Petitioner is a citizen of the United States, domiciled in the City of Nashville, State of Tennessee.

2. He is now unjustly and unlawfully confined, deprived of his liberty, and imprisoned against his will, and in violation of his rights under the Constitution and laws of the United States, in the United States Penitentiary at Lewisburg, Pennsylvania, by John C. Taylor, Warden of said Penitentiary, and within the jurisdiction of this Court.

3. The cause or pretext of this detention is the sentence of a General Court Martial appointed by the Commanding General, USAREUR, Communications Zone, U. S. Army, convened at Orleans, France, 20 March, 1953. pursuant to the following orders, Par 5, SO 47, Hq USAREUR Communications Zone, dtd 10 Mar 53; as amended by Par 15, SO 50, Hq. USAREUR Communications Zone, dtd 13 Mar 53; as further amended by Par 9, SO 54, Hq. USAREUR Communications Zone, dtd 19 Mar 53., as follows:

4a "Albert Grisham, it is my duty as president of this court to inform you that the court in closed session and upon secret written ballot, three-fourths of all the members present at the time the vote was taken concurring, sentences you to be confined at hard labor for the term of your natural life."

4. Your Petitioner was subsequently committed to the custody of the Attorney General who is executing the sentence of said Court Martial through the Respondent.

5. The record of trial of Petitioner by General Court Martial, on which his conviction and sentence are based, is on file in the Office of the Judge Advocate General of the Army, in the Pentagon, Washington 25, D. C. and is referred to as part hereof and as Petitioner's Exhibit A. A review of the record of trial is necessary for the Court's determination of Petitioner's right to a Writ of Habeas Corpus.

6. Petitioner's sentence is based upon, and immediately followed, a finding of guilty of the charge of violation of the Uniform Code of Military Justice, Article 118. The only specification under this charge alleged:

"Specification: In that Albert H. Grisham, European Command, U. S. Army, Orleans District Engineers, a person employed by the U. S. Army and serving with the U. S. Army outside the continental limits of the United States, did, at Orleans, France, on or about 6 December 1952, with premeditation, murder Dolly D. Grisham by means of striking her on the head and body with a bottle, striking her on
5a the head and body with his fist, and kicking her on the head and body with his feet.

Signature of Accuser:
(s) Robert Erlenkotter
ROBERT ERLENKOTTER

Rank and Organization:
Colonel, Orleans District Engineer"

7. The sentence of the Court Martial to confinement at hard labor for life has since been reduced by clemency action to 35 years; and the United States Penitentiary, Lewisburg, Pennsylvania, has been and is designated as the place of confinement.

8. Petitioner has exhausted his administrative remedies in that his case was reviewed by the Office of the Staff Judge Advocate and approved by the Commander

who convened the Court. The record was further forwarded to a Board of Review in the Office of the Judge Advocate General, which sustained his conviction. An appeal was then taken to the United States Court of Military Appeals, which also reviewed his case and sustained the conviction. The exact dates, docket numbers, and records concerning the exhausting of Petitioner's administrative remedies are not in his possession, nor are they readily available to him. Petitioner believes and therefore avers, however, that these records are on file in the Office of the Judge Advocate General of the Army in the Pentagon, Washington 25, D. C.

9. From May, 1946, to December 6, 1952, the date of the alleged premeditated murder, Petitioner was a civilian employee of the District Engineer, Nashville District, having received his appointment as such civilian em-
6a ployee under the U. S. Civil Service Commission, and was not a member of the Armed Forces of the United States. On September, 1952, Petitioner was temporarily loaned to the Orleans District Engineers.

10. The charge on which the Petitioner was tried by Military General Court Martial is a capital offense, and the acts charged against Petitioner were allegedly committed at 74 Bd. Alexandre Martin, where Petitioner and his wife were residing, in the City of Orleans, France, which is within the jurisdiction of the French authorities, and is not located on a military base.

11. The victim was Petitioner's wife, Dolly D. Grisham, a United States citizen, and a civilian who had no connection with the United States Army, other than the fact that she was married to the Petitioner, a civilian Civil Service employee of the District Engineers.

12. Before the Court Martial convened, Petitioner moved to dismiss the proceedings on the ground that the General Court Martial, which had been convened to try him, did not have jurisdiction. (See page 22 et sec. of the record of trial, Exhibit A.) The record of trial which was given to Petitioner is not complete so far as the matter of jusidiction is concerned, because two paragraphs of Appellant's Exhibit No. 1, page 1, were deleted, or cut

from the record ". . . for reasons of national security". These deleted paragraphs, which were cut from the record, are on fe in the Office of the Judge Advocate General of the Army, and the Petitioner believes, and therefore avers, that these items will show that the Justice Department of the French Republic was extremely reluctant to surrender jurisdiction to the military authorities in this case,
7a and that the French authorities had charged Petitioner with murder, subsequently reduced to aggravated assault, a lesser offense, which was not capital in nature.

13. The issues of Petitioner's sanity and of intoxication were of vital importance in his conviction, and were decided against him in accordance with the manual issued under the President's name with regard to the defenses of insanity and intoxication in Military Trials.

14. The confinement, deprivation of liberty and imprisonment of Petitioner is unlawful in that, under the facts alleged, the provisions of the Uniform Code of Military Justice, under which the court martial asserted jurisdiction over Petitioner, Article 2 (11) of Uniform Code of Military Justice, 50 U. S. C., Section 552 (11), is unconstitutional, being a direct violation of Article III, Section 2, and the Fifth and Sixth Amendments to the Constitution. (See Reed vs. Covert and Kinsello vs. Kruger, 77 S. Ct. 1222, Advance sheet No. 16 July 1, 1957, and cases cited therein.)

WHEREFORE, to relieve him of his unlawful and unjust imprisonment, your Petitioner prays that:

1. A Writ of Habeas Corpus, directed to the said John C. Taylor, Warden of the U. S. Penitentiary at Lewisburg, Pennsylvania, may issue in his behalf so that your Petitioner may be brought before this Court to do, submit to, and receive what the law may direct;

2. That Responder† be required to show cause, if any he has, why Petitioner should not be released and discharged, and as part of said cause be directed and
8a required to file in this proceeding the original, or a certified copy of the Record of Trial of Petitioner by General Court Martial, including the two paragraphs cut

from page 1, in Appellate's Exhibit No. 1, referred to above;

3. That the Court order Petitioner's release and discharge from prison, and grant him liberty.

Albert H. Grisham
Petitioner

IN UNITED STATES DISTRICT COURT

Return and Answer—November 25, 1957

Comes now the respondent, John C. Taylor, Warden, United States Penitentiary, Lewisburg, on whom has been served a rule to show cause why a writ of habeas corpus should not be granted and by his attorneys makes return and answer to the said rule and respectfully shows to the court that he holds the said Albert H. Grisham by authority of the United States as a prisoner pursuant to the sentence of a general court martial under the following circumstances:

I.

That the said Albert H. Grisham, a civilian employee of the Department of the Army and a person employed by and serving with the armed forces within the meaning of Article 2(11), Uniform Code of Military Justice (10 USC 802 (11)), was duly arraigned for the offense
9a of premeditated murder in violation of Article 118, Uniform Code of Military Justice (10 USC 918) before a general court martial convened by paragraph 8, Special Orders Number 47, Headquarters, United States Army Europe Communications Zone, APO 58, dated 8 July 1953, as amended by paragraph 15, Special Orders Number 50, same headquarters, dated 13 March 1953, and paragraph 10, Special Orders Number 54, same headquarters, dated 19 March 1953. At the arraignment the petitioner stood mute. Thereupon the Court entered a plea of not guilty on his behalf to the offense charged. He was found not guilty of the premeditated murder but guilty of the lesser and included offense of unpremeditated murder, in violation of Article 118, Uniform Code of Mili-

tary Justice (10 USC 918). He was sentenced by the court martial to be confined at hard labor for the term of his natural life.

Prior to the plea on the general issues the petitioner moved to dismiss the charge on the ground that the court martial lacked jurisdiction to try the petitioner and the offense charged. This motion was predicated on petitioner's contention that jurisdiction over the person and offense remained with France and that nation had not waived such jurisdiction to the United States. The Law Officer denied the motion. The Staff Judge Advocate in the review of the record of trial and in the submission of his written opinion thereto to the convening authority under the provisions of Article 61, Uniform Code of Military Justice (10 USC 861) considered the merits of the petitioner's motion and the propriety of the Law Officer's ruling thereon and determined that the denial of this motion was proper and correct (Exhibit D). On 8 July 1953 the convening authority, in taking his action upon the case as required by Articles 61 and 64, Uniform Code of Military Justice (10 USC 861 and 864), approved the sentence. The record of trial was then forwarded to The Judge Advocate General of the Army for a review by a Board of Review as required by Article 66, Uniform Code of Military Justice (10 U.S.C. 866). An authenticated copy of General Court Martial Order Number 61, Headquarters USAREUR Communications Zone APO 58, dated 8 July 1953, promulgating the findings and sentence as approved by the convening authority is attached hereto (Exhibit A).

10a

On 3 September 1953, appellate counsel for the petitioner, filed an assignment of errors with the Board of Review. One of the principal contentions pressed by the petitioner was that the evidence was insufficient at the court-martial to establish that the petitioner was a civilian employee of the Department of the Army, amendable to court-martial jurisdiction under Article 2(11) Uniform Code of Military Justice (10 USC 802 (11)). It was admitted that the record of trial established that the petitioner was employed by the Nashville District Engineers, United States Army, and that he was subsequently trans-

ferred to Europe for temporary assignment with the Orleans District Engineer Office, United States Army, at Orleans, France. However, the petitioner contended that those facts were insufficient to establish whether his employment "related to activities of the Armed Forces of the United States or to some other European Construction Activity."

On 11 December 1953, the Board of Review rendered its decision in the case. After a lengthy and detailed statement of facts which set forth all pertinent data and
11a material, the Board of Review stated its conclusions with respect to the sufficiency of the evidence to establish petitioner's amenability to court-martial jurisdiction. The Board of Review found that the evidence in the record established that at the time of the alleged offense the petitioner "was an employee of the United States Corps of Engineers on six month's temporary duty with the Orleans District Engineer Office at Orleans, France," and that he "was clearly a person 'serving with, employed by, or accompanying the Armed Forces without the continental limits of the United States' within the meaning of Article 2 of the Uniform Code of Military Justice. He was therefore a person subject to the Code and properly triable by courts-martial." The Board of Review found the approved findings of guilty and the sentence correct in law and fact and having determined, on the basis of the entire record, that they should be approved, affirmed the same (Exhibit E). The United States Court of Military Appeals granted the petitioner a review of the decision of the Board of Review under the provisions of Article 67, Uniform Code of Military Justice (10 USC 867). On 24 September 1954 the United States Court of Military Appeals affirmed the decision of the Board of Review (Exhibit F). Final appellate review under the provisions of Article 71c, Uniform Code of Military Justice (10 USC 871c) having been completed, the sentence was ordered executed on 15 October 1954. The United States Penitentiary, Lewisburg, was designated as the place of confinement. On 8 March 1957, by clemency action the Secretary of the Army reduced the period of confinement to 35 years (Exhibit C). An authenticated copy of General Court-Martial Orders Number 48, Headquar-

ters Second Army, Fort George G. Meade, Mary-
12a land, 15 October 1954, promulgating the results of the affirming action and ordering the sentence into execution is appended hereto (Exhibit B).

II.

Answering the allegations contained in the petition for writ of habeas corpus, the respondent admits, denies and alleges as follows:

1. Admits the allegations contained in paragraph 1 of the petition.

2. Admits the allegations contained in paragraph 2 of the petition except the allegations that the imprisonment is unjust and unlawful and specifically denies that such imprisonment is unjust and unlawful and in violation of his Constitutional rights.

3. Admits Albert H. Grisham was tried by an Army General Court-Martial at Orleans, France between 20 and 27 March 1953, that he is now confined pursuant to a General Court-Martial sentence, imposed upon conviction of an offense in violation of the Uniform Code of Military Justice (10 USC 801 et seq.), committed by the said Albert H. Grisham on 6 December 1952, while Grisham was a France; and denies all other allegations in paragraph 3 of the petition.

4. Admits the allegations contained in paragraph 4 of the petition and alleges that the Attorney General designated the United States Penitentiary, Lewisburg, Pennsylvania as the place of confinement.

13a 5. Admits that the original record of trial by general court-martial in the case of the petitioner is on file in the Office of The Judge Advocate General of the Army and alleges that the petitioner was properly served with an exact copy thereof and denies all other allegations of paragraph 5 of the petition.

6. Admits the allegations contained in paragraph 6 of the petition.

7. Admits the allegations contained in paragraph 7 of the petition.

8. Admits the allegations contained in paragraph 8 of the petition but alleges that the decision of the Board of Review and the opinion of the United States Court of Military Appeals are published in 13 CMR 486 and 16 CMR 268, respectively.

9. Admits that petitioner was not a member of the Armed Forces of the United States; but alleges that at the time of the offense of which he was convicted and the trial by court-martial he was a Department of the Army civilian employee, assigned to the United States Army Corps of Engineers on temporary duty with the Orleans District Engineer, at Orleans, France.

10. Admits the allegations contained in paragraph 10 of the petition and alleges that jurisdiction was waived by the French authorities under the terms of the treaty between the United States and France.

11. Admits Dolly D. Grisham, a United States citizen, was a civilian and dependent wife of Albert H.
14a Grisham, a civilian employee of the Department of the Army; and denies all other allegations of paragraph 11 of the petition.

12. Admits petitioner moved to dismiss the charges at his court-martial on the ground that the court-martial lacked jurisdiction over the said petitioner and the offense; and denies all other allegations of paragraph 12 of the petition.

13. Denies the allegations contained in paragraph 13 of the petition.

14. Denies the allegations contained in paragraph 14 of the petition.

III.

Further answering the respondent avers:

a. That the prisoner was a civilian employee of the Department of the Army and that he was accompanying, employed by, and serving with the armed forces without the continental limits of the United States both at the time of the offense for which he was tried by court-martial, and at the time of trial.

b. That the general court-martial by which the prisoner was tried and convicted had jurisdiction over the person of the prisoner and of the offense charged against him, and that the sentence adjudged against the prisoner by the court-martial was within the legal limits and within the power of the Court to adjudge.

WHEREFORE, the respondent respectfully prays this Honorable Court that the rule to show cause be discharged, that the petition for writ of *habeas corpus* be dis-
15a missed, and that the petitioner, Albert H. Grisham, remain in the custody of the respondent.

(s) Robert J. Hourigan
United States Attorney

(s) Lt. Col. Cecil I. Forinash
The Judge Advocate General's Corps
United States Army

(s) Lt. Col. Peter S. Wondolowski
The Judge Advocate General's Corps
United States Army

16a IN UNITED STATES DISTRICT COURT

Excerpts From Transcript of Testimony

[Line 20, p. 3 to Line 7, p. 10 incl.]

Direct Examination

BY MR. KALP:

Q. You are Albert H. Grisham?
A. Yes.
Q. Where is your home?
A. Nashville, Tennessee.
Q. I call your attention to the month of September, 1952. How were you employed at that time?
A. I was employed by the United States District Engineer, Nashville.

Q. And what was your status with the District Engineer's office at Nashville?

A. I was a civil service employee, G.S. 9, cost accounting.

Q. And what were you working on?

A. You mean the type of work?

Q. What was the nature of your work?

A. I was cost accountant, sir.

Q. And in connection with what projects?

A. Primarily the maintenance and improvement of existing river and harbor works, and construction of multiple control dams. However, during the Korean Conflict, or along about that time, our district was engaged in rehabilitating certain installations that had been used by the Army during the war, but my payment was made at all times from civilian funds, Civil Works.

17a Q. Now what happened about September 30, 1952?

A. I was placed on temporary duty for six months with the United States Army in Europe.

Q. And where were you assigned?

A. I was assigned, upon arrival over in Europe, to Orleans, France.

Q. And when did you arrive there, approximately?

A. The first day of October, I believe. I am almost sure it was the first day of October.

Q. What was the nature of the work to which you were assigned in Orleans, France?

A. Along with two other individuals, we were setting up a cost accounting system for the building of the line of communication from Pardeau, France, to Kossalater, Germany, which came under NATO.

Q. Now I call your attention to December 6 and 7, 1952. Where were you residing at that time?

A. I was living at 74 Alexandre Martin Boulevard, in Orleans, France.

Q. And what was the nature of your quarters there?

A. It was an apartment.

Q. And from whom did you rent this apartment?

A. It was a French lady. I don't know her name. I can't pronounce it.

Q. A French civilian?

A. Yes.

Q. And I believe sometime before December 6th your wife came over to live with you, is that right?

A. That's correct.

Q. Can you tell us when she came over?

A. She arrived either on the 30th day of November, or the first day of December.

18a Q. And she was living with you in this apartment, was she not?

A. Yes, sir.

Q. Who was furnishing the food for you and your wife?

A. We were.

Q. Who was furnishing your medical care?

A. Well, I don't know whether I was authorized medical care or not, but I was furnishing it.

Q. And who furnished transportation for you to and from your place of employment?

A. I did, sir.

Q. And how far was your place of employment from this apartment?

A. About two miles. However, I would like to amend that last statement. They had a lot of vehicles running around, busses, and so on; and if you wished to avail yourself, you could ride to certain stop areas within the City, and it was optional. However, I usually did furnish my own transportation.

Q. When you say "they" you mean the military authorities?

A. Yes sir.

Q. Who paid you while you were working in France?

A. The Nashville office.

Q. Of what?

A. The Corps of Engineers, Nashville District. They paid their check and deposited it in the bank to my credit. They were reimbursed on a standard Form 1080, I believe, by the United States Army in Europe.

MR. KALP: That's all.

19a *Cross-Examination*

BY LT. COL. FORINASH:

Q. I just have one or two questions.

Medical care was available to you from the Army in Orleans, France, was it not?

A. I do not know, sir. To the best of my knowledge,

I was never told that we could get medical care there. I know that we were sent out, as I recall, once to have our teeth examined. I don't know whether that was a requirement or a courtesy extended by the Army.

Q. In addition, was a Post Exchange available in the Orleans district in France?

A. Yes.

Q. You had access to that?

A. Yes.

Q. And they sold food, and so on, did they not?

A. In the Post Exchange they sold—I don't believe they sold staples, Colonel. They sold various things, but I don't think they sold staple foods. In fact, I am sure they didn't.

Q. And in addition to the Post Exchange, there was also a commissary which the families used in that area?

A. Which I had privilege to use, but which my wife did not have privilege to use.

Q. That was because she hadn't been there a sufficient time?

A. I had applied to have her declared a dependent. It had to be cleared through the Ambassador, and I was told in Paris, and that had never been cleared through there, and I was never notified that she had been designated as a dependent.

20a Q. Now, you received an additional allowance over and above your pay as G.S. 9?

A. Travel pay, yes.

Q. And an additional monthly allowance?

A. No, sir.

Q. And the so-called Station Allowance?

A. I was allowed per diem only.

Q. When you are on per diem, you are not entitled to a Station allowance?

A. No, I don't think so.

Q. And the per diem is to secure quarters in lieu of furnishing of such quarters by the military, isn't that the purpose?

A. I think so, yes.

Q. You were a civilian employe for how long?

A. Since 1936, other than the fact that I was in the Army for about 52 months during the war. But even so,

I was on military furlough during that period. I was still carried on the rolls at Nashville, Tennessee, continuously since 1936.

Q. You know, though, that per diem allowed by the Army is to pay for your housing, in lieu of housing which normally is furnished by the Army?

A. Yes, sir, that's true, Colonel, or by any government agency, in fact.

Q. And you were paid for your work in Orleans, France, by the United States Army?

A. My checks were drawn, as I say, I remained on the Nashville roll, and my checks were drawn from civilian works funds. It was reimbursed by the Army. So, I thought that I was there more or less for a specific purpose which could be compared, it seems to me, to
21a selling supplies to the Army. I was selling them service, more or less.

Q. The civil works, of course, which you refer to, is nothing more or less than the United States Army Engineers—

A. Civil works, sir, not military, no connection whatever with the military. Civil works is just what it means, civil works, sir.

Q. Accomplished by the United States Army Engineers Corps?

A. Yes.

Q. And under the supervision of the Secretary of the Army?

A. Yes, sir, that's correct.

LT. COL. FORINASH: I have nothing further.

MR. KALP: That's all.

(Witness excused.)

22a IN UNITED STATES DISTRICT COURT

V.

Opinion—April 22, 1958

This habeas corpus proceeding poses the question as to whether a civilian employee attached to the armed

forces of the United States stationed in a foreign country is subject to trial by court-martial for a capital offense.

The issue arises on a return and answer to a rule to show cause granted in response to a petition for a writ of habeas corpus filed by petitioner, a prisoner confined at the United States Penitentiary at Lewisburg, Pennsylvania, against the Warden of the Penitentiary.

The record of the court-martial was introduced into evidence.

The petitioner, Albert H. Grisham, a Department of the Army civilian employee assigned to the Corps of Engineers, United States Army, Nashville District, Nashville, Tennessee, arrived in France on October 1, 1952, and was assigned for temporary duty with the Orleans District Engineer, Office Headquarters USA REUR Communications Zone, Orleans, France. On November 1, 1952, he was joined by his wife, Dolly Dimples Grisham, and they established residence at 74 Boulevard Alexander Martin in Orleans, France.

On the evening of December 6, 1952, petitioner and his wife attended a cocktail party, where both became somewhat intoxicated. Mrs. Grisham was last seen alive by witnesses other than her husband, returning
23a home with her husband, the petitioner, at about 9:45 o'clock that evening. The following morning she was found lying dead, in her bed. He head, face and body were bloody, bruised and battered. An autopsy revealed that the cause of her death was "severe hemorrhage in the chest wall and in the abdomen and tissues of the body."

Petitioner was arrested by the French authorities. On December 23, 1952, France waived jurisdiction over the petitioner and the offense, and released the petitioner to the jurisdiction of the American Military Authorities. Petitioner was subsequently tried by a United States Army General Court-Martial between March 20 and 27, 1953, for the premeditated murder of his wife, in violation of Article 118, Uniform Code of Military Justice (10 U.S.C. Sec. 918). At the trial the petitioner objected to his trial by general court-martial on the ground that the court-

martial lacked jurisdiction over his person and the offense charged. Petitioner contended that exclusive jurisdiction over the offense upon which he was arraigned was vested in France and was punishable only under French law. The general court-martial denied the motion to dismiss the charge and specification on the ground of lack of jurisdiction. Petitioner remained mute at the time of arraignment, and a plea of not guilty was entered on his behalf by the law office. Petitioner was found not guilty of premeditated murder guilty of the lesser and included offense of unpremeditated murder in violation of Article 118, Uniform Code of Military Justice (10 U.S.C. Sec. 918), and was sentenced by the court-martial to be confined at hard labor for the term of his natural life. The sentence was subsequently reduced by clemency action to thirty-five years.

24a The alleged authority for the jurisdiction of the general court-martial which tried petitioner is Article 2 (11) of the Uniform Code of Military Justice (64 Stat. 107, 109), which provides:

> "The following persons are subject to this code:
>
> * * * * * * * * *
>
> "(11) Subject to the provisions of any treaty or agreement to which the United States is or may be a party or to any accepted rule of international law, all persons serving with, employed by, or accompanying the armed forces without the continental limits of the United States * * *"

It is the contention of the petitioner that the court-martial was without jurisdiction because Article 2 (11) of the Uniform Code of Military Justice was unconstitutional in so far as it authorized the trial by court-martial of this petitioner admittedly a civilian employe of the United States Army, and that as a civilian he had been deprived of his constitutional rights to indictment by a grand jury and trial by jury.

In United States of American ex rel. Dominic Guagliardo v. Neil H. McElroy, Secretary of Defense, et al., D.C.D.C., Slip Opinion dated January 13, 1958, a habeas

corpus proceeding, Judge Holtzhoff (sic) concluded that civilian employees attached to the armed forces of the United States abroad may be subjected to trial by court-martial and that Article 2, subsection (11) of the Uniform Code of Military Justice is constitutional; that the court-martial by which the petitioner was tried had jurisdiction over him; that the petitioner was not unlawfully restrained of his liberty, and dismissed the petition. The
25a petitioner there was employed by the Department of the Air Force as an electrical lineman at Nouasseur Air Deport, Morocco. He was charged with larceny of Government property, and in addition, with two other persons, he was charged with conspiracy to commit larceny. He was tried and convicted by a general court-martial at the Air Depot and sentenced. The convening authority disapproved the finding of guilty on the first of the two charges, but approved the sentence on the second charge.

As in the instant case, the court's attention in the Guagliardo case was directed to United States ex rel. Toth v. Quarles, Secretary of the Air Force, 350 U.S. 11, and Reid, Superintendent, District of Columbia Jail v. Covert, 354 U.S. 1. In the Toth case it was held that a former member of the armed forces who had been discharged from the service and was no longer under the control of the armed forces was not subject to trial by court-martial for an offense committed during his term of service.

The Covert case involved the status of a wife of a member of the armed forces of the United States, who accompanied her husband while he was stationed on foreign soil and who killed her husband. The case was heard and decided by eight members of the Supreme Court as Mr. Justice Whittaker did not participate. Mr. Justice Black delivered an opinion in which the Chief Justice, Mr. Justice Douglas and and Mr. Justice Brennan joined. This opinion held in effect that civilian wives, children, and other dependents of members of the armed forces could not be constitutionally subjected to trial by court-martial since they could not be regarded as any part of the
26a armed forces. Mr. Justice Frankfurter and Mr. Justice Harlan wrote separate opinions concurring in the result but limiting their conclusion to the view that

in capital cases civilian dependents of members of the armed forces could not be constitutionally tried by court-martial. Mr. Justice Clark, with whom Mr. Justice Burton joined, wrote a dissenting opinion. As indicated by Judge Holtzoff, the only point on which a majority of the justices concurred is that in a capital case a civilian dependent of a member of the armed forces may not be tried by court-martial.

Judge Holtzoff then summarizes the present state of the Sppreme Court's decision on the question as follows:

> "A former member of the armed forces, who has been discharged and is no longer within the control of the military, is not subject to trial by court-martial for an offense committed during his term of service. (Toth.)
>
> "A wife, a child, or other dependent of a member of the armed forces is not subject to trial by court-martial in a capital case. (Covert.)
>
> "The Supreme Court has not determined whether a dependent accompanying a service man is subject to trial by court-martial in a case other than capital.
>
> "Similarly, the Supreme Court has never had occasion to decide whether a civilian employee attached to the armed forces in a foreign country, is subject to trial by court-martial."

The instant case therefore seems to provide the necessary factual base for a determination on one of the
27a two above remaining facets of this perplexing constitutional question involving courts-martial.[1]

In the light of the exhaustive coverage given this matter by the four opinions in Covert, the opinion in Guagliardo, and the opinion of Judge Latimer in United States v. Burney, 6 USCMA 776, (referred to in Guagliardo), it would seem that any further critical analysis of the authorities here would be mere supererogation.

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[1] Mr. Justice Frankfurter in Reid v. Covert, 354 U. S. 1, 45, said, inter alia: "* * * The Court has not before it, and therefore I need not intimate any opinion on, situations involving civilians, in the sense of persons not having a military status, other than dependents. * * *"

The evidence in this case clearly shows that this petitioner killed his wife in a most inhuman and sadistically brutal fashion. I fully realize that this characterization of the crime involved is not in any sense determinative of the question involved. Murder is murder and whether it is done with the savagery of a Hun or the finesse of a story-book thriller is of no consequence.

Final termination of a state of war with the Axis powers was effected April 28, 1952. While it is true the Korean conflict began in June 1950 and ended in July 1953 (United States v. Shell, 7 USCMA 646, 23 CMR 110) and the Korean conflict has been held to constituted a state of war for the purpose of the administration of military justice (United States v. Bancroft, 3 USCMA 3, 11 CMR 3; United States v. Gann, 3 USCMA 12, 11 CMR 12; United States v. Ayers, 4 USCMA 220, 15 CMR 220; United States v. Taylor, 4 USCMA 232, 15 CMR
28a 232), the fact remains the offense involved here did not take place at or near a field during time of war or in the face of an actively hostile enemy or in an area where actual hostilities were under way.

In Covert, supra (at pages 22, 23), Mr. Justice Black stated:

> "* * * We recognize that there might be circumstances where a person could be 'in' the armed services for purposes of Clause 14 even though he had not formally been inducted into the military or did not wear a uniform. * * *"

It may well be argued that there is not the urgency for strict military discipline at a time and in an area of peace as in a hostile area. Certainly, it would seem that the army is still charged with a heavy responsibility in connection with the conduct and behavior of its personnel, army and civilian, while on foreign soil and whether in war or in peace.

In the light of the divergent opinions in Covert and the self-defeating alternatives, enumerated and evaluated by Mr. Justice Harlan in Covert (Note 12, Page 76), I conclude, paraphrasing Mr. Justice Black, Covert supra,

that this is a circumstance where petitioner was in the armed services for purposes of Clause 14 even though he had not been formally inducted into the military and did not wear a uniform.

I further conclude, in the light of the above observations, that civilian employees attached to the armed forces of the United States abroad may be subjected to trial by court-martial, even in capital cases, and that Article
29a 2, subsection (11) of the Uniform Code of Military Justice in so far as it relates to the facts of the instant case is constitutional; that the court martial by which petitioner was tried had jurisdiction over him and that, consequently, the petitioner is not unlawfully restrained of his liberty.

The Rule to Show Cause will be discharged and the petition for a writ of Habeas Corpus will be denied.

(s) FREDERICK V. FOLLMER
United States District Judge

IN UNITED STATES DISTRICT COURT

Order—April 22, 1958

Now, to wit: April 22, 1958, for the reasons set forth in the foregoing Opinion, It is Ordered and Decreed that the petition of Albert H. Grisham for a Writ of Habeas Corpus be and the same is hereby denied, and the Rule to Show Cause issued thereon is discharged.

(s) FREDERICK V. FOLLMER
United States District Judge

IN UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 12,630

ALBERT H. GRISHAM, *Appellant*

v.

JOHN C. TAYLOR, WARDEN OF UNITED STATES PENITENTIARY AT LEWISBURG, PENNSYLVANIA

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF PENNSYLVANIA.

Argued October 24, 1958

Before GOODRICH, McLAUGHLIN and KALODNER, *Circuit Judges.*

Opinion of the Court—Filed November 20, 1958

By GOODRICH, *Circuit Judge.*

This is an appeal from a district court decision denying the petitioner habeas corpus, 161 F. Supp. 112 (M.D. Pa. 1958). Albert H. Grisham was a civilian accountant employed by and serving with the United States Army in France. While assigned overseas Grisham and his
32a wife resided in a rented apartment in Orleans.

Grisham was arrested by French officials as a result of the death of his wife in December, 1952. At the request of the Army he was turned over to military authorities and was charged by them with the premeditated murder of his wife, a capital offense. 10 U.S.C. § 918 (Supp. V, 1958). He was tried by a court-martial and convicted of unpremeditated homicide. Having been sentenced to prison, he now seeks release on habeas corpus proceedings.

The foundation of this petition is the Supreme Court's decision in *Reid v. Covert*, 354 U.S. 1 (1957). Our difficulty in this case is to make up our minds how far *Reid v. Covert* takes us. One thing is clear. Under that decision the wife of a man in military service who accompanies her husband abroad cannot in peacetime be tried in a foreign

country by a United States military court-martial for a capital crime. But the opinion by Mr. Justice Black was joined by only three of his colleagues. Two others, Mr. Justice Frankfurter and Mr. Justice Harlan, rendered separate concurring opinions and two, Mr. Justice Clark joined by Mr. Justice Burton, dissented.[1]

The district court, disposing of the instant case, relied largely on Judge Holtzoff's opinion in *United States ex rel. Guagliardo v. McElroy*, 158 F. Supp. 171 (D.D.C. 1958). But that decision was overruled by the Court of Appeals for the District of Columbia Circuit by a divided court (2-1). — F.2d — (D.C.Cir. 1958). *Guagliardo* involved the same statute as that in the *Covert* case. It is article 11 of the Uniform Code of Military Justice, 10 U.S.C. § 802(11) (Supp. V, 1958), which reads as follows:

> "(11) Subject to any treaty or agreement to which the United States is or may be a party or to any accepted rule of international law, persons serving with, employed by, or accompanying the armed forces outside the United States. . . ."

33a are subject to the authority of the courts-martial described by the statute.

In the *Guagliardo* case the petitioner was a civil service employee of the Air Force. The crime with which he was charged was not a capital crime but larceny. The District of Columbia Circuit Court said that it was not going to decide any constitutional question: that since the Supreme Court had said the section of the Military Justice Code when applied to person "accompany the armed forces" was unconstitutional the whole clause fell.

With due deference to a very competent court, we cannot join in this ground for granting a habeas corpus writ. The statute in question expressly contains a reservation clause providing:

> "If a part of this Act is invalid, all valid parts that are severable from the invalid part remain in effect. If a part of this Act is invalid in one or more of its

[1] Mr. Justice Whittaker took no part in the consideration or decision of the case.

applications, the part remains in effect in all valid applications that are severable from the invalid applications." Pub. L. No. 1028, 84th Cong., 2d Sess., 70 A STAT. 640 (Aug. 10, 1956).

We think this provision controls, and that we must look to see whether a difference may not exist as to persons "serving with" or "employed by" from those "accompanying" the armed forces.

Granted that authority compels the conclusion that a wife accompanying her husband abroad is not to be tried by court-martial, it does not follow that persons "serving with" or "employed by" the armed forces may not be so tried. At least it does not so follow until the Supreme Court says that it does. We do not get helpful authority, then from the *Guagliardo* opinion except for a reason we cannot share.

So we are confronted with the problem of the application of the *Covert* case to a civilian employee of the armed forces serving abroad, prosecuted for a capital offense in peacetime and tried by court-martial. Grisham was charged in France with premeditated murder, a capital offense. The conviction was for unpremeditated murder which is not a capital offense.

34a.

The question involved is one which we think it is fair to say was left open by the language of Mr. Justice Black's opinion in the *Covert* case. On page 22 of Volume 354, United States Reports, he says:

> "Even if it were possible, we need not attempt here to precisely define the boundary between 'civilians' and members of the 'land and naval Forces.' We recognize that there might be circumstances where a person could be 'in' the armed services for purposes of Clause 14 even though he had not formally been inducted into the military or did not wear a uniform."

We do not make this quotation to prove that Mr. Justice Black concluded there was a difference; only to show that the possibility was in his mind and no commitment on the point made.

We think that this civilian Army employee presents a different case from that of a soldier's wife and that the weight of consideration tends to support the argument for permitting Congress to subject him to the jurisdiction of the Court-Martial as the statute provides.[2] The fact that civilian personnel accompanying armed forces have, for a long time, apparently been treated as subject to discipline by military authorities is a factor supporting this conclusion.[3] This is not conclusive, of course. But things which have long been established practice run less danger
35a of being called unconstitutional than do innovations. See, for instance, *Ownbey v. Morgan*, 256 U.S. 94, 112 (1921); *Anderson v. Luckett*, 321 U.S. 233, 244 (1944).

There is the practical point. An army can and for years has gone along without wives accompanying it. But civilian employees are essential to the hundreds of things which an army now has to do in addition to fighting. The practical difficulties involved in denying to Courts-Martial jurisdiction over offenses by such people are set out by Mr. Justice Harlan in footnote 12 on page 76 of 354 U.S.[4]

Furthermore, these civilian employees are associating with the Army through their own volition. The soldier may have no choice as to whether he is in the Army or not. Once in, he has no choice about leaving his employment until his term expires. But the civilian can work for the Army or not as he pleases; he can decline to work further if he is told to go where he does not want to go. We think that by voluntarily associating himself with the armed forces it is not unreasonable to put him under the same discipline which members of those forces are under.

Grisham was not living on the Army base at the time of the alleged offense. But he was eligible to receive many

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[2] The Constitutional source of Congressional authority is Art. I, § 8, cl. 14: "The Congress shall have Power . . . To make Rules for the Government and Regulation of the land and naval Forces."

[3] The Government cites to us authority going back a long time to show that civilians attached to the armed forces have been subjected to military jurisdiction in time of peace. Unfortunately we do not have access to the material cited, some of which is said to be in the National Archives.

[4] See Note, *Criminal Jurisdiction Over Civilians Accompanying American Armed Forces Overseas*, 71 HARV. L. REV. 712 (1958).

privileges which the soldiers got. He could buy goods at the commissary; he could get medical and dental care; he had the benefit of the special armed services postal facilities, special customs privileges, etc. We think, therefore, that the fact that he did not live on the Army base is a matter of no significance.

In other words, Grisham was in the position of the person described by Mr. Justice Black and quoted above. He had not been formally inducted, he did not wear a uniform, but he was as closely connected with the Army as though he had.

We are advised by counsel for the respondent that appeal has been taken in one case involving a similar prob-
36a lem[5] and that certiorari is to be asked for in the District of Columbia case. If the view we have expressed is incorrect there will be opportunity for its correction when the Supreme Court has spoken.

The judgment of the district court will be affirmed.

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[5] Singleton v. Kinsella, — F. Supp. — (S.D. W. Va. 1958) (noncapital offense by a dependent wife accompanying her service husband overseas in Germany). Direct appeal to the Supreme Court is available under 28 U.S.C. § 1252 (1952).

IN UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 12,630

ALBERT H. GRISHAM, *Appellant*,

vs.

JOHN C. TAYLOR, WARDEN OF UNITED STATES PENITENTIARY AT LEWISBURG, PENNSYLVANIA

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

Present: GOODRICH, McLAUGHLIN and KALODNER, *Circuit Judges.*

Judgment—November 20, 1958

This cause came on to be heard on the record from the United States District Court for the Middle District of Pennsylvania and was argued by counsel

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this case be, and the same is hereby affirmed.

(File endorsement omitted)

39a **Mandate—Signed and Sealed December 8, 1958**

UNITED STATES OF AMERICA, SS:

THE PRESIDENT OF THE UNITED STATES OF AMERICA

To the Honorable the Judges of the United States District Court for the Middle District of Pennsylvania

—GREETING:

WHEREAS, lately in the United States District Court for the Middle District of Pennsylvania, before you or some of you, in a cause between Albert H. Grisham, Petitioner and John C. Taylor, Warden of U. S. Penitentiary at Lewisburg, Pennsylvania, Respondent (District Court No. 330 Habeas Corpus) an order was entered on April 22, 1958 in favor of Respondent and against Petitioner, as by the inspection of the record of the said District Court, which was

brought into the United States Court of Appeals for the Third Circuit by virtue of an appeal by Albert H. Grisham agreeably to the Act of Congress, in such case made and provided, more fully and at large appears.

AND WHEREAS, the said cause came on to be heard before the said United States Court of Appeals for the Third Circuit, on the said record, and was argued by counsel;

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this case be, and the same is hereby affirmed. November 20, 1958

40a YOU, THEREFORE, ARE HEREBY COMMANDED that such proceedings be had in said cause, in conformity with the opinion and judgment of this court, as according to right and justice, and the laws of the United States, ought to be had, the said appeal notwithstanding.

Signed and sealed this 8th day of December in the year of our Lord one thousand nine hundred and fifty-eight.

IDA O. CRESKOFF
Clerk, United States Court of Appeals for the Third Circuit

(File endorsement omitted)

41a Clerk's Certificate to foregoing transcript omitted in printing

43a SUPREME COURT OF THE UNITED STATES

No. 622, Misc., October, Term, 1958

Albert H. Grisham, *Petitioner*,

vs.

John C. Taylor, *Warden*.

Order of Substitution—April 27, 1959

On Consideration of the motion to substitute Charles R. Hagan, Warden, in the place of John C. Taylor, Warden, as the party respondent in this case,

It Is Ordered by this Court that the said motion be, and the same is hereby, granted.

45a SUPREME COURT OF THE UNITED STATES

No. 622, Misc., October, Term, 1958

Albert H. Grisham, *Petitioner*,

vs.

Charles R. Hagan, *Warden*.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

Order Granting Motion for Leave to Proceed in Forma Pauperis and Granting Petition for Writ of Certiorari—April 27, 1959

On Consideration of the motion for leave to proceed herein in forma pauperis and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed in forma pauperis be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted and case transferred to the appellate docket as No. 870. The case is set for argument immediately following No. 725.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

☆ U. S. GOVERNMENT PRINTING OFFICE 1959—511336/P. O. 1653